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No. 00-1335

In the Supreme Court of the United States

TEXAS COMMITTEE ON NATURAL RESOURCES,
PETITIONER

v.

ANN M. VENEMAN, SECRETARY OF AGRICULTURE,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's broad challenge to the entire course of the Forest Service's on-the-ground management of four National Forests in Texas was not suitable for judicial review because petitioner had failed to identify a reviewable "final agency action."

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-33a) is reported at 228 F.3d 559. The opinion of the court of appeals panel (Pet. App. 34a-99a) is reported at 185 F.3d 349. The opinion of the district court (Pet. App. 100a-198a) is reported at 974 F. Supp. 905. An earlier opinion of the court of appeals in this case is reported at 38 F.3d 792. An earlier opinion of the district court is reported at 822 F. Supp. 356.

JURISDICTION

The judgment of the en banc court of appeals was entered on September 20, 2000. A petition for rehearing was denied on November 21, 2000 (Pet. App. 199a-200a). The petition for a writ of certiorari was filed on February 20, 2001 (the Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Texas Committee on Natural Resources, along with two other national environmental groups, filed suit in 1985 to challenge management practices in the four National Forests in Texas. Pet. App. 4a. The United States Department of Agriculture, the Secretary of Agriculture, the United States Forest Service, and three Forest Service officers were named as defendants. Two timber industry groups intervened as defendants. The federal and industry defendants are the respondents in this Court.

In its fourth amended complaint, filed in 1992, petitioner alleged that even-aged timber management,[1] as practiced in the National Forests in Texas, had resulted in violations of Section 6 of the National Forest Management Act of 1976 (NFMA), Pub. L. No. 94-588, 90 Stat. 2952 (16 U.S.C. 1604), and regulations implementing that provision. Pet. App. 6a-7a. Petitioner requested injunctive relief against any further timber

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[1] "Even-aged management encompasses timber harvesting techniques which involve cutting all or almost all of the trees in the same stand at the same time." Pet. App. 5a. "Even-aged management contrasts with uneven-aged management (also called selection management), which involves selective cutting and which therefore results in differently-aged trees in the same stand." *Id.* at 5a n.5.

sales or even-aged management in all four of those National Forests. *Ibid.*

The district court entered a preliminary injunction, which was reversed by the court of appeals. See Pet. App. 7a-8a. The district court subsequently conducted a trial on various issues, including "[w]hether the Forest Service has, in practice, as required by the regulations, kept current and adequate inventories and monitoring data for key resources in the national forests in Texas; * * * protected key resources in its application of even-aged management techniques; and * * * provided for diversity of plant and animal communities in its application of even-aged management techniques." *Id.* at 103a-104a. During the trial, petitioner introduced evidence, mainly in the form of photographs and testimony of witnesses, from selected timber harvest sites, allegedly showing violations of NFMA requirements. While some of the evidence related to particular timber sales, those sales were presented as examples of forest-wide failures, rather than as particular final agency actions for which relief was sought. See, *e.g.*, *id.* at 138a-148a. Petitioner did not request relief as to particular timber sales. Rather, consistent with its theory of the case, petitioner requested a broad injunction against even-aged management practices in all four Forests "until the defendants comply with NFMA." *Id.* at 8a n.7.

The district court entered an Order and Injunction concerning "Even-aged Management and Inventorying-Monitoring Issues." Pet. App. 101a. The court held that it had jurisdiction under the Administrative Procedure Act (APA) "to review the Forest Service's failure to act with respect to alleged on-the-ground violations of the NFMA and regulations." *Id.* at 110a. The district court stated that "[o]nce the Forest Service

adopted a final, definite course of action or inaction with respect to the management of the forest lands (regardless of whether that action or inaction is memorialized in a written agency decision), the court has a 'final agency action' to review." *Id.* at 111a.

The district court ultimately decided that "[t]he Forest Service has stepped outside its discretion and acted arbitrarily and capriciously" with respect to "protecting the key resources of soil and watershed" and with respect to several aspects of "inventorying and monitoring." Pet. App. 101a. The court enjoined the respondents from further timber harvesting in the four National Forests, with some exceptions related to forest health, "until such time that the Forest Service (1) complies with the NFMA and regulations with respect to the implementation of past timber sales and (2) assures the court that any future timber harvesting will be in compliance on-the-ground." *Id.* at 195a.

2. Respondents appealed. Respondents contended, *inter alia*, that petitioner had failed to identify any final agency action subject to judicial review under the APA, and that petitioner's broad programmatic challenge to the management of federal lands was barred by this Court's decision in *Lujan* v. *National Wildlife Federation*, 497 U.S. 871 (1990). A panel of the court of appeals affirmed. Pet. App. 34a-99a. The panel majority concluded that the failure of the Forest Service to follow NFMA regulations in its day-to-day management of the National Forests could itself be characterized as "final agency action." *Id.* at 69a-70a; see also *id.* at 69a n.27 ("electing not to comply with regulations is in effect a 'passive order'"). Judge Garza dissented. *Id.* at 87a-99a. Judge Garza would have held that the APA does not authorize challenges to the agency's day-to-day management of National Forests in the absence

of some "final agency action" such as a timber sale. *Id.* at 89a-92a. He explained that "[i]f [petitioner] believe[s] that any particular proposed even-aged timber sale will result in NFMA and regulatory violations, then [it] may file an action challenging the Forest Service's decision to proceed with the sale." *Id.* at 96a (citing *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 736 (1998)).

3. The court of appeals granted rehearing en banc, and the en banc court reversed the judgment of the district court. Pet. App. 1a-33a. The en banc court explained that petitioner's challenge was "precisely the type of programmatic challenge that the Supreme Court struck down in *Lujan*." *Id.* at 15a. The court held that plaintiffs under the APA cannot demand a general review of day-to-day agency operations, but must instead focus their challenge on identifiable actions that mark the consummation of an agency decisionmaking process. *Id.* at 13a. The court of appeals held in addition that petitioner's identification of several timber sale decisions as examples of alleged irregularities did not make its challenge justiciable, because the scope of its challenge extended to the entire course of management of the National Forests in Texas. *Id.* at 16a-18a. The court also explained that an agency's alleged failure to comply with NFMA standards in its management of the Forests cannot properly be characterized as a "failure to act" subject to review under 5 U.S.C. 706(1). Pet. App. 19a.

Judge Higginbotham concurred in the majority opinion and filed a separate concurring opinion. Pet. App. 2a n.*, 23a-28a. Five members of the court dissented. *Id.* at 2a n.*, 28a-33a. The dissenting judges would have held that petitioner had adequately identified "specific timber sales and actions taken by the Forest

Service which they alleged violate the NFMA." *Id.* at 30a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner recognizes that "[its] operative pleadings asserted that the Forest Service was not carrying out its timber harvesting consistent with NFMA and its regulations" (Pet. 4), but maintains that within this programmatic challenge was embedded a discrete challenge to 28 "ripe timber sales" (Pet. 17). Petitioner contends that the court of appeals' failure to permit review of those 28 sales is inconsistent with this Court's decision in *Ohio Forestry Ass'n*, 523 U.S. at 736.[2]

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[2] Contrary to petitioner's contention (Pet. 17), the evidence at trial did not "fully address[] the ripe timber sales." Indeed, the lengthy district court opinion contains no analysis of the legality of particular timber sales. There likewise is no support for petitioner's statement (*ibid.*) that "it was uncontroverted that the Forest Service did no inventorying and monitoring anywhere in Texas National Forests, including the areas which had been the subject of final agency action, where ripe timber sales were pending." Although the district court found the agency's inventorying and monitoring activities to be deficient in some respects, it found in favor of the Forest Service on some inventorying/monitoring issues. See Pet. App. 180a n.18 ("on the evidentiary record before the court, the Forest Service appears to be making progress on-the-ground toward maintaining current data on the fish MIS [Management Indicator Species] populations * * *, and thus the Federal Defendants have not violated the inventorying and monitoring requirements with respect to the fish resource"); *id.* at 182a ("on this evidentiary record, Federal Defendants have not violated the inventorying and monitoring requirements with

Petitioner's contention that it properly challenged 28 timber sales is unsupported by the record. As the court of appeals correctly recognized, those particular sales were cited by petitioner merely as examples of allegedly deficient Forest Service management of the Texas National Forests generally, not as discrete final agency actions for which petitioner sought review. Pet. App. 16a-17a. Neither the review sought, nor the relief requested by petitioner in the district court, was in any way focused on particular agency actions that "mark the consummation of the agency's decisionmaking process" and "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 13a (quoting *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997)). As the court of appeals pointed out, the fourth amended complaint attacked even-aged management practices generally, and pointed to particular timber sales only as examples of allegedly faulty practices. *Id.* at 6a & n.6.

Consistent with that understanding, the district court explained that it was "reviewing the Forest Service's on-the-ground compliance in managing the forest over the entire planning area," and specifically distinguished that mode of judicial scrutiny from review of "a one-time, site-specific [environmental impact statement] for timber sales." Pet. App. 175a. Indeed, the district court's conclusion that petitioner had satisfied the requirements of the APA was based on the court's view that the entire course of forest management within the relevant geographic areas could properly be characterized as "final agency action." See, *e.g.*, *id.* at 111a ("Once the Forest Service adopted a

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respect to the resources of soil, watershed, recreation, and timber").

final, definite course of action or inaction with respect to the management of the forest lands (regardless of whether that action or inaction is memorialized in a written agency decision), the court has a 'final agency action' to review.").

The court of appeals panel similarly recognized the breadth of petitioner's challenge:

> In this case, the Forest Service argues, the action is not final because the timber sales have yet to take place or even be announced. This argument, while compelling on its face, misses the point that the action which [petitioner] contest[s] is the failure to follow the NFMA regulations; the remedy is the prohibition on future timber sales stemming from even-aged timber management.

Pet. App. 61a. Only after the court of appeals granted rehearing en banc did petitioner suggest that the timber sales mentioned in the complaint as examples of allegedly improper management activities were the "final agency actions" for which they sought review, rather than mere illustrations of a broad pattern of allegedly deficient management.

Contrary to petitioner's contention (Pet. 11, 16), *Ohio Forestry Ass'n* v. *Sierra Club*, *supra*, fully supports the court of appeals' decision in this case. The plaintiff in *Ohio Forestry*, like petitioner here, objected to even-aged management practices in a National Forest and asked for a broad injunction prohibiting further timber sales. *Id.* at 731-732. This Court found that the plaintiff's challenge was not ripe for review, explaining that judicial review divorced from particular site-specific proposals was both disruptive to the agency and burdensome for the courts. *Id.* at 735-736. The Court acknowledged that a plaintiff might find it less efficient

"to pursue many challenges to each site-specific logging decision to which the Plan might eventually lead," *id.* at 734, but it observed that "[t]he case-by-case approach * * * is the traditional, and remains the normal, mode of operation of the courts," *id.* at 735 (quoting *National Wildlife Fed'n*, 497 U.S. at 894).

2. Petitioner's contention (Pet. 14) that "the court of appeals holding effectively forecloses redress for *any* violation of NFMA's substantive harvesting requirements" is without merit. The court of appeals addressed petitioner's concern regarding possible "on-the-ground" violations of NFMA by pointing to instances where other plaintiffs had obtained review of such alleged violations in the course of challenging particular timber sale decisions. See Pet. App. 20a-21a. The court declined to reach the question whether the implementation of a timber sale (as distinct from the timber sale decision) is a reviewable final agency action, explaining that "[t]his issue is not before us because [petitioner] did not attack the implementation of specific timber sales but rather attacked general Forest Service practice in the Texas forests." *Id.* at 21a. The court likewise found it unnecessary to "address limits plaintiffs face on when they can introduce evidence of past timber sales and their implementation to show that specific timber sales before the court are improper." *Ibid.*[3] There is consequently no basis for petitioner's assertion (Pet. 16) that "a plaintiff seeking to correct

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[3] Judge Higginbotham's concurring opinion expressed the view that a court in reviewing a timber sale decision may consider evidence regarding the Forest Service's implementation of prior timber sales if that evidence indicates that the Forest Service will violate the law in executing or implementing the specific challenged sale. Pet. App. 26a.

violations of the NFMA in the *implementation* of timber sales is completely prevented from doing so by the Fifth Circuit's opinion."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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